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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In The Matter of	)	
Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996	)	**CC Docket No. 96-128**

COMMENTS OF THE TELECOMMUNICATIONS RESELLERS ASSOCIATION IN SUPPORT OF REQUEST FOR STAY OF THE PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION

The Telecommunications Resellers Association ("TRA"),[1] through undersigned counsel and pursuant to Section 1.45(d) of the Commission's Rules, 47 C.F.R. § 1.45(d), hereby submits the following comments in support of the "Request for Stay" ("Petition") filed by the Personal Communications Association Industry ("PCIA") in the captioned proceeding. In its Petition, PCIA urges the Commission to stay the effectiveness of the Commission's *Second Report and Order*, FCC 97-371, (released October 9, 1997) ("*Payphone Remand Order*"), until such time

[1] A national trade association, TRA represents more than 650 entities engaged in, or providing products and services in support of, telecommunications resale. TRA was created, and carries a continuing mandate, to foster and promote telecommunications resale, to support the telecommunications resale industry and to protect and further the interests of entities engaged in the resale of telecommunications services. The overwhelming majority of TRA's resale carrier members provide interexchange telecommunications services, and hence, are required to compensate payphone service providers (either directly or through their underlying network services providers) for payphone-originated toll free and access code calls.

as local exchange carriers ("LECs"), and in turn, payphone service providers ("PSPs") provide the payphone-specific coding digits necessary to enable interexchange carriers ("IXCs") to block calls from payphones. At a minimum, PCIA requests that the stay extend until at least March 9, 1998, at which time the current waiver of this obligation expires. In TRA's view, PCIA has made the showing required by the Commission to warrant grant of the equitable relief it requests here; TRA, accordingly, urges the Commission to expeditiously grant the PCIA Petition.

I. INTRODUCTION

In addressing requests for equitable relief, the Commission has long applied the four-factor test announced in Virginia Petroleum Jobbers Association v. FCC, 259 F.2d 921, 925 (D.C. Cir. 1958), as modified in Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977).[2] Thus, an applicant for stay must show that (i) it is likely to succeed on the merits on appeal; (ii) it will suffer irreparable harm in the absence of a stay; (iii) a stay would not substantially harm other interested parties; and (iv) a stay would serve the public interest.[3] "The test is a flexible one . . . relief may be granted with either a high likelihood of success and some injury or *vice versa*."[4] Indeed, as the Commission has recognized, a stay may be

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[2] *See, e.g.*, Price Cap Regulation of Local Exchange Carriers, 10 FCC Rcd. 11979, ¶ 17 (1995); Expanded Interconnection with Local Telephone Company Facilities, 8 FCC Rcd. 123, ¶ 6 (1992).

[3] *See, e.g.*, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (Order), 11 FCC Rcd. 11745, ¶ 7 (1996); Access Charge Reform (Order), CC Docket No. 262, FCC 97-216, ¶ 4 (released June 18, 1997).

[4] Population Institute v. McPherson, 797 F.2d 1062, 1078 (D.C.Cir. 1986) (emphasis in original).

granted upon a mere showing that the Commission's action "raises serious legal issues if the petitioners' showings on the other factors are particularly strong."[5]

PCIA has made a strong showing as to each of the four tests for grant of the equitable relief it seeks here.

II. ARGUMENT

A. PCIA Has Demonstrated That It Is Likely To Succeed On The Merits Of Its Appeal

As the Commission has acknowledged, the waiver granted to LECs and PSPs which cannot provide payphone-specific coding digits as required by the Commission's "per-call" payphone compensation mechanism "requires IXCs to pay compensation for certain calls without the ability to block those calls on a real-time basis."[6] Yet the ability of IXCs to block payphone-originated calls was the linchpin of the Commission's conclusion that "the deregulated local coin rate, adjusted for cost considerations, is a reasonable market-based surrogate for determining the default per-call compensation rate." As the Commission explained:

> We conclude that because we make the per-call amount subject to negotiations, the marketplace will make the appropriate adjustments in the per-call rate. We established the per-call default rate to be applied only if the PSP and the IXC are unable to negotiate some other rate of compensation for compensable calls. . . . IXCs may choose to pass on the per-call compensation rate to their customers. In the case of 800 subscriber calls, the IXC could pass on the cost to the called party. If the called party refused to accept calls for which

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[5] Expanded Interconnection with Local Telephone Company Facilities, 8 FCC Rcd. 123 at ¶ 6, fn. 10.

[6] Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996 (Order), CC Docket No. 96-128, FCC 97-2162, ¶ 13 (Oct. 7, 1996)

> it was charged the default rate, but was willing to accept calls with a lower charge, the IXC and the PSP may find it in their mutual interest to negotiate a per-call rate lower than the default rate.[7]

"The significant leverage within the marketplace to negotiate for lower per-call compensation amounts" with which the Commission credited IXCs, however, is predicated on the ability of IXCs to block payphone-originated calls.[8] As described by the U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit"), "the Commission expected the IXCs would have 'substantial leverage' to negotiate due to their ability to block subscriber 800 calls from any particular PSP's payphones."[9] Indeed, the Commission itself declared that "carriers that are concerned about overcompensating PSPs for subscriber 800 calls have substantial leverage, by way of the ability to block these calls from all or particular payphones, to negotiate with PSPs about the appropriate per-call compensation amount."[10]

In awarding a waiver to LECs and PSPs which cannot provide payphone-specific coding digits as required by the Commission's "per-call" payphone compensation mechanism, the Commission, however, has deprived IXCs of whatever negotiating leverage they may have had. As PCIA points out, imposition of market-based compensation obligations on IXCs while at the same

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[7] Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996 (Second Report and Order), CC Docket No. 96-128, FCC 97-371, ¶ 28 (Oct. 9, 1996)

[8] Id. at ¶ 97.

[9] Illinois Public Telecommunications Ass'n v. FCC, 117 F.3d 555, 560, *clarified on rehearing* 123 F.3d 693 (D.C. Cir. 1997).

[10] Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996 (Order on Reconsideration), 11 FCC Rcd. 21233, ¶ 71 (1996), *vacated in part sub nom.* Illinois Public Telecommunications Ass'n v. FCC, 117 F.3d 555, 560, *clarified on rehearing* 123 F.3d 693 (D.C. Cir. 1997).

time depriving them of the ability to block calls is, simply put, arbitrary and capricious. If IXCs are to be able to blunt PSP market power, they must at least have the ability to decline to deal with individual PSPs. If IXCs cannot identify the payphone-originated calls on a real-time basis, they have no choice but to accept and pay for all payphone-originated toll free and access code calls.

The Commission cannot have it both ways. If the negotiating leverage which purportedly arises out of an IXC's ability to block payphone-originated calls on an individual payphone basis renders use of deregulated local coin rates, adjusted for cost considerations, a reasonable market-based surrogate for payphone-originated toll free and access code calls, then IXCs must be able to block such calls for the Commission's reliance upon deregulated local coin rates to have any semblance of reasonableness. It is noteworthy the D.C. Circuit remarked that the ability of IXCs to "'block' calls from overpriced payphones" by itself was not enough to "save a default rate that is inexplicably tied to a local coin rate."[11] Certainly, the elimination of that ability wholly undermines the credibility of the Commission's action.

In short, PCIA has shown a strong likelihood that it will prevail on the merits of its appeal.

B. Small To Mid-sized IXCs Will Be Irreparably Harmed Absent Grant Of the Requested Stay

While the telecommunications resale industry is a maturing market segment comprised of an eclectic mix of established, publicly-traded corporations, emerging, high-growth companies and newly created enterprises, the "rank and file" of TRA is still comprised of small to mid-sized carriers serving small to mid-sized businesses. The average TRA resale carrier member has been in business

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[11] Illinois Public Telecommunications Ass'n v. FCC, 117 F.3d 555 at 564.

for five years, serves 10,000 customers, generates annual revenues of $10 million and employs in the neighborhood of 50 people.[12] The average customer of a TRA resale carrier member is a commercial account generating $100 to $1,000 of usage a month. In other words, the average TRA resale carrier member is an entrepreneurial venture, which has gained a solid, but nonetheless competitively precarious, foothold in the telecommunications industry.

The harm that will be visited upon small to mid-sized IXCs if the stay requested by PCIA is not granted will be particularly adverse. The small business customers of these carriers are highly resistant to the imposition of additional charges, particularly large, unanticipated assessments. The experience of TRA's resale carrier members in attempting to pass through payphone compensation, paid either directly or to underlying network service providers in conjunction with the interim compensation mechanism, has confirmed the intensity of this resistance, as well as the adverse competitive ramifications of attempting to impose large new charges on small commercial accounts. Unfortunately, smaller carriers, unlike some of their larger competitors, have neither the traffic volumes over which to spread the amounts paid to originate toll free or access code calls from payphones without significantly increasing rates nor the operating margins within which to absorb these amounts without adversely impacting their financial

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[12] Roughly 30 percent of TRA's members have been in business for less than three years and over 80 percent were founded less than a decade ago. While the growth of TRA's resale carrier members has been remarkable, the large majority of these entities remain relatively small. Nearly 35 percent of TRA's members generate revenues of $5 million or less a year and less than 20 percent have reached the $50 million revenue threshold. Additionally, nearly seventy-five percent of TRA's resale carrier members employ less than 100 people and nearly 50 percent have workforces of 25 or less. Nonetheless, more than a third of TRA's resale carrier members provide service to 25,000 or more customers. Source: TRA's "1996 Reseller Membership Survey & Statistics (Sept. 1997).

viability.[13] While blocking calls from individual payphones is not an attractive alternative for small to mid-sized carriers which are often highly reliant upon pre-paid and post-paid calling card revenues, call blocking at least permits smaller providers to exercise financial control, and perhaps negotiate a more rational compensation level. Absent call blocking, smaller carriers face potential financial liability of unknown proportions, all too aware that their prospects for recovery of such amounts from their small business customers are limited.

Exacerbating the problems attendant to the recovery of payphone compensation from customers are the unique circumstances facing the many TRA resale carrier members which are currently offering pre-paid calling cards. A pre-paid calling card provider must have "real-time" access to payphone-specific coding digits in order to debit charges unique to payphone-originated calls. Absent such "real-time" access, pre-paid calling card providers have no way to recover amounts paid to compensate PSPs for the access code calls placed using pre-paid calling cards; the one and only time such recovery can be effected is when a call is placed. Monthly or quarterly statements are meaningless when cards can be depleted with a single call. Thus, without payphone-specific coding digits, pre-paid calling card providers will have no choice but to absorb amounts paid to compensate PSPs for payphone-originated access code calls and to suffer the obvious adverse financial consequences.

Finally, several parties have petitioned the U.S. Court of Appeals for the District of Columbia Circuit for review of the Commission's *Payphone Remand Order*, arguing, among other

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[13] Payphone compensation is only one of several large new regulatory assessments being levied on small to mid-sized carriers (and their small business customers). Such carriers will soon be paying the new $2.75 per line multi-line business preferred interexchange carrier charge and contributing roughly four percent of their end user revenues to universal service support mechanisms.

things, that the compensation amount is severely inflated.[14] In the event that the Court grants these appeals and the compensation amount is reduced as a result, smaller carriers will have little hope of recovering amounts paid directly to PSPs absent voluntary return of those monies by all PSPs. Given the large number of PSPs and the relatively small amounts that would be recoverable from each, pursuing recovery through litigation would be financially and administratively unworkable.

As the Commission has oft declared, "'[t]he key word' in an analysis of irreparable harm is 'irreparable.'"[15] While "[e]conomic loss does not, in and of itself, constitute irreparable harm,"[16] it does if there are no meaningful prospects for loss avoidance and no hope of monetary recovery. "The basis for injunctive relief . . . has always been irreparable harm and inadequacy of legal remedies."[17] Economic loss may constitute irreparable harm if it is not recoverable or, if it is recoverable, the loss threatens the very existence of a business.[18] Here, amounts paid to PSPs to originate toll free and access code calls which cannot be blocked are not recoverable, either in whole or in part, and the harm that will be visited upon small and mid-sized IXCs, particularly those engaged in the provision of pre-paid calling card service may, in some instances, prove fatal.

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[14] *See, e.g.*, MCI Telecommunications Corp. v. FCC, Case No. 97-1675 (D.C. Cir. Nov. 1997).

[15] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (Order), 11 FCC Rcd. 11745 at ¶ 8.

[16] Access Charge Reform (Order), CC Docket No. 96-262, FCC 97-216, ¶ 30 (released June 18, 1997).

[17] Sampson v. Murray, 415 U.S. 61, 88 (1974).

[18] Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 843, fn. 2 (D.C. Cir. 1977).

C. Balancing The Interests Of The Parties And The Public Weighs Heavily In Favor of the Stay Requested By PCIA

The two remaining requirements for grant of a stay include an analysis of the public interest and a balancing of interests among the parties. It is indisputable that PSPs will be denied revenues for the duration of a stay, but these are revenues which PSPs have heretofore not received; hence, financial and business adjustments will not be required to accommodate their loss. Moreover, the Commission has the authority to ensure future recovery of such monies through additional assessments; hence, the harm suffered is only a delayed, not an absolute, economic loss.

In contrast, the harm to small to mid-sized IXCs will not only be irreparable, but will dramatically alter the status quo. As discussed above, smaller carriers, particularly pre-paid calling card providers, will confront new and unknown liabilities which may threaten their financial viability, as well as their customer relations and hence their competitive position. Other than ceasing to offer key services such as "800"/"888" inbound and pre-paid and post-paid calling cards, there is little smaller carriers will be able to do to avoid or mitigate the threat.

Certainly, the public interest would not be well served by undermining the most vibrant and dynamic segment of the long distance industry. Nor would the public interest be furthered by imposing on customers or carriers costs they would elect to avoid if given the choice. Neither carriers nor customers should be assessed costs which the Commission, in imposing those costs, assured the public and the industry could be voluntarily avoided.

III. CONCLUSION

By reason of the foregoing, the Telecommunications Resellers Association urges the Commission to expeditiously grant the Request for Stay of the *Second Report and Order* filed by the Personal Communications Industry Association in the captioned proceeding.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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